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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Avamar Technologies, Inc.

Serial No. 78153324

Rochelle D. Alpert of Morgan, Lewis & Bockius, LLP for
Avamar Technologies, Inc.

Susan C. Hayash, Trademark Examining Attorney, Law Office
110 (Chris A.F. Pedersen, Managing Attorney).

Before Hairston, Walters, and Drost, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On August 12, 2002, Avamar Technologies, Inc.
(applicant) applied to register the mark AXION, in standard
character form, on the Principal Register for goods
ultimately identified as "computer software and hardware
for secure storage and delivery of electronic data;
computer software and hardware that enables users to
backup, restore, archive, recover, organize, and replicate
electronic data stored in multiple systems across local
and/or remote networks, and instruction and user manuals

sold together therewith" in Class 9. The application (Serial No. 78153324), originally based on an intention to use the mark in commerce, has been amended to allege a date of first use and first use in commerce of October 15, 2002.

The examining attorney¹ refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of Registration No. 1,540,881 for the mark AXION SYSTEMS in standard character form for "computer software and hardware installation services" in Class 37 and "computer software and hardware design services, and computer software support services" in Class 42.² The registration contains a disclaimer of the term "Systems."

The examining attorney argues that "consumers are likely to remember both marks as having a common element, AXION." Brief at 5. Furthermore, the examining attorney maintains that "applicant's goods are complementary, and fall into a reasonable expansion of trade of the registrant." Brief at 7. Applicant, on the other hand, argues that "the installation, design and support services for the cited registration share no commonality with Applicant's secure data storage and management products

¹ The current examining attorney was not the original examining attorney in the case.

² The registration issued May 23, 1989, and a Section 8 affidavit was been accepted.

over computer networks. The only remote connection that could possibly be derived is that they both, broadly speaking, involve computer technology." Brief at 8.

After the examining attorney made the refusal final, this appeal followed.

The Federal Circuit and the Court of Customs and Patent Appeals have set out the factors that we should consider when there is a question of likelihood of confusion. In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin by comparing the marks in their entireties as to their similarities and dissimilarities of the marks as to their sound, appearance, meaning, and commercial impression. The marks AXION and AXION SYSTEMS obviously contain the same word "Axion." The only difference is the

addition of the disclaimed term "Systems" in the registered mark. Disclaimed matter is often "less significant in creating the mark's commercial impression." In re Code Consultants, Inc., 60 USPQ2d 1699, 1702 (TTAB 2001). The descriptive word, "Systems" would not have much trademark significance for services that involve designing, installing, and supporting hardware and software for computer systems. "Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'" Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

We certainly do not ignore the word "Systems" in registrant's mark when we compare the marks AXION and AXION SYSTEMS. However, "Axion" does not appear to have any recognized meaning in relation to computer goods and services,³ and it would be the dominant term in both marks. The marks AXION SYSTEMS and AXION sound and look similar

³ Axion is defined as "a hypothetical particle having no charge, zero spin, and small mass: postulated in some forms of quantum chromodynamics." *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987). We take judicial notice of this definition. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

and their meanings and commercial impressions are very similar.

Next, we look at the relationship between applicant's goods and registrant's services. Applicant's goods are: computer software and hardware for secure storage and delivery of electronic data; computer software and hardware that enables users to backup, restore, archive, recover, organize, and replicate electronic data stored in multiple systems across local and/or remote networks, and instruction and user manuals sold together therewith. Applicant's goods include hardware and software for the secure storage of data and network software. Registrant's services involve computer software and hardware installation, design, and support services.

In cases involving computer products, we must be careful not to paint with too broad a brush. There is no rule that all computer products are related and we are hesitant to hold that computer installation services are related to all computer software and hardware simply because they are installed on computers. See, e.g., Electronic Design & Sales, Inc. v Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992) ("Although opposer's services and applicant's goods are purchased by some of the same large *corporations*, the

individual departments therein may be as independent in their purchasing activities as were the hospital departments in Astra [Pharmaceutical Products v. Beckman Instruments, 718 F.2d 1201, 220 USPQ 786 (1st Cir. 1986)]" (emphasis in original); In re Quadram Corp., 228 USPQ 863, 865 (TTAB 1985) ("[W]e think that a per se rule relating to source confusion vis-à-vis computer hardware and software is simply too rigid and restrictive an approach and fails to consider the realities of the marketplace").

The examining attorney has not simply argued that all computer products and services are related but she has submitted copies of registrations to support her arguments that the goods and services are related. Several of these registrations are particularly relevant to the facts of this case inasmuch as they involve computer installation, design or support services and hardware or software related to security or networking. Registration No. 2,809,867 includes computer design and network consultation services and computer software for data encryption and security. No. 2,858,254 includes computer hardware and software installation and software design services as well as computer network hardware and software. No. 2,635,820 includes computer technical support services and computer software for electronic commerce security and to enable

users to control access to computer networks. No. 2,817,905 is for computer design and installation services and computer software designed to search a computer network. Each of these registrations includes goods and services similar to the identification of goods and services in the application and cited registration, thus suggesting that applicant's goods and registrant's services may originate from the same source. See In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"). See also In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993).

In order for goods and services to be related, it "has often been said that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks

used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services." In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991). See also Time Warner Entertainment Co. v. Jones, 65 USPQ2d 1650, 1661 (TTAB 2002). Prospective purchasers of applicant's identified hardware and software would likely also be prospective purchasers of registrant's types of services, namely, installation, design, and technical support services. Under the facts of this case, we conclude that applicant's goods and registrant's services are related.

Applicant maintains that its products "do not accommodate or involve any third party design or installation services" and that its products "are bought by sophisticated purchasers." Brief at 2. As previously stated, the question is not whether applicant's goods are the same as or would include the services in the cited registration. Rather, the question is whether the respective goods and services are sufficiently related that, if identified by confusingly similar marks, there would be confusion as to source.

Furthermore, even if the purchasers are sophisticated, this would not mean confusion is not likely. In re Total

Quality Group Inc., 51 USPQ2d 1474, 1477 (TTAB 1999) ("We recognize applicant's attorney's point that its software is expensive and that purchasers of it are likely to be sophisticated. Suffice it to say that no evidence in support of these assertions was submitted. In any event, even careful purchasers are not immune from source confusion"). See also In re Hester Industries, Inc., 231 USPQ 881, 883 (TTAB 1986) ("While we do not doubt that these institutional purchasing agents are for the most part sophisticated buyers, even sophisticated purchasers are not immune from confusion as to source where, as here, substantially identical marks are applied to related products"). Here, when prospective purchasers encounter the arbitrary marks AXION SYSTEM for computer hardware and software installation, design, and support services and AXION on the identified hardware and software, even sophisticated purchasers would likely assume there is a relationship between the goods and services.

Applicant also points to another registration for the mark AXION 4 GSTP and design for software programs for data processing, creating and maintaining databases for use in connection with cross border and domestic transactions of all kinds of securities. Third-party registrations cannot be used to justify the registration of another confusingly

similar mark. In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987). The registration of a single registration with additional wording and a design does not establish a lack of a likelihood of confusion in this case.

In response to applicant's argument that "there has been no actual confusion occurring as a result of the coexistence of the AXION and AXION SYSTEMS marks in the marketplace for two years, we point out that the lack of actual confusion hardly precludes a holding that there is a likelihood of confusion.

With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See In re Bissett-Berman Corp., 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, J.C. Hall Co. v. Hallmark Cards, Inc., 52 CCPA 981, 340 F.2d 960, 964, 144 USPQ 435, 438 (CCPA 1965), especially in an ex parte context.

Majestic Distilling, 65 USPQ2d at 1205.

In this case, applicant's allegation of no actual confusion is not significant because there is little evidence of market overlap so we cannot give the statement of applicant's counsel much weight.

Applicant has also asked us to take judicial notice that registrant has not filed additional applications and that it does not own additional registrations. Brief at 5 n.1 and 8 n.2. "The Board does not take judicial notice of records residing in the Office." International Association of Lions Clubs v. Mars, Inc., 221 USPQ 187, 189 n.8 (TTAB 1984). We add that the fact that a registrant does not own additional applications or registrations does not limit the scope of the current registration and even if this information was properly of record, it would not change the outcome of this proceeding.

After considering the record in this case, we are persuaded that confusion is likely when the marks AXION and AXION SYSTEMS are used on the identified goods and services. AXION is an arbitrary term. When prospective purchasers familiar with AXION SYSTEMS computer design, installation and support services encounter applicant's AXION hardware and software, they are likely believe that the sources of the goods and services are related or associated.

To the extent that we have any doubts, we resolve them in favor of the registrant, as our case law requires. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); In re Pneumatiques, Caoutchouc

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Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918,
179 USPQ 729, 729-30 (CCPA 1973).

Decision: The examining attorney's refusal to
register under Section 2(d) is affirmed.